



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 8
999 18TH STREET - SUITE 300
DENVER, CO 80202-2466
Phone 800-227-8917
<http://www.epa.gov/region08>

DOCKET NO.: FIFRA-08-2003-0015

IN THE MATTER OF:)	
)	
)	
UDAP INDUSTRIES)	FINAL ORDER
13160 Yond ^{er} Road)	
Bozeman, MT 59718)	
)	
Respondent)	

Pursuant to 40 C.F.R. § 22.18, of EPA's Consolidated Rules of Practice, the Consent Agreement resolving this matter is hereby approved and incorporated by reference into this Final Order. The Respondents are hereby ORDERED to comply with all of the terms of the Consent Agreement, effective immediately upon receipt by Respondents of this Consent Agreement and Final Order.

September 22, 2003
DATE

SIGNED
Alfred C. Smith
Regional Judicial Officer

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8**

Docket No. **FIFRA-08-2003-0014**

IN THE MATTER OF:)
) **COMPLAINT AND EXPEDITED**
UDAP Industries) **SETTLEMENT AGREEMENT (CESA)**
13160 Yonder Road)
Bozemen, MT 59718)
Respondent)
_____)

A. JURISDICTION

1. This Complaint and Expedited Settlement Agreement (“CESA”) is issued to UDAP Industries (“Respondent”) for multiple violations of Sections 3(c)(1)(C) and 12(a)(1)(B) of the Federal Insecticide, Fungicide and Rodenticide Act (“FIFRA”), 7 U.S.C. § 136a(c)(1)(C) and 7 U.S.C. § 136j(a)(1)(B), respectively, and regulations promulgated at 40 CFR Part 152.

2. The undersigned Environmental Protection Agency (“EPA”), Region 8 officials issue this CESA under the authority vested in the Administrator of EPA by Section 14(a) of FIFRA, 7 U.S.C. § 136l(a).

3. This section authorizes EPA to bring an action under Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1), for civil administrative penalties against Respondent who has violated, or is in violation of, a requirement or prohibition of FIFRA.

B. ALLEGED VIOLATION

1. Respondent is a "person" within the meaning of Section 2(s) of FIFRA, 7 U.S.C. Section 136(s), and is therefore subject to regulation.

2. Respondent is a "distributor/seller" as defined by Section 2(gg) of FIFRA, 7 U.S.C. Section 136(gg).

3. Respondent sells and distributes Pepper Power™ bear deterrent pepper spray, a “pesticide” within the meaning of Section 2(u) of FIFRA, 7 U.S.C. Section 136(u).

4. As defined by Section 2(p) of FIFRA, 7 U.S.C. 136(p), the clamshell insert to the Pepper Power™ bear deterrent pepper spray constitutes the pesticide “label.”

5. EPA conducted an inspection at McGuckin Hardware located in Boulder, Colorado, on December 11, 2002, and recorded numerous sales of Pepper Power™ bear deterrent pepper spray and the clamshell insert from January, 2001, through and including February, 2003.

6. Subsequent to the inspection, EPA determined that the Respondent failed to file a statement of the claims, statements and graphics printed on the clamshell insert of the Pepper Power™ bear deterrent pepper spray during the registration of the product and prior to distributing and/or selling the pesticide from January, 2001, through and including February, 2003.

7. The Pepper Power™ bear deterrent pepper spray label, as distributed by the Respondent, differs substantially from the material accepted in connection with the product registration in that the following claims were not accepted in connection with the registered product's label:

- a. “ ‘Wisdom is Better than Strength’ Ecc.9:16”
- b. “As seen on the Discovery Channel!”
- c. “a grizzly bear attack survivor” featuring a picture of Mark Matheny
- d. References to a web site
- e. “Self-Defense Use only”
- f. “UDAP Industries concerned with Your Safety, and the preservation of Wildlife”

8. Under Sections 3(c)(1)(C) and 12(a)(1)(B) of FIFRA, 7 U.S.C. § 136a(c)(1)(C) and 7 U.S.C. § 136j(a)(1)(B), respectively, and regulations promulgated at 40 CFR Part 152, it is unlawful for any person to distribute or sell a pesticide that is not registered under Section 3 of FIFRA, 7 U.S.C. §136a and it is unlawful for any person to distribute or sell to any person any registered pesticide if any claims made for it as a part of its distribution or sale substantially differ from any claims made for it as a part of the statement required in connection with its registration under section 136a of this title.

9. Respondent’s sales of Pepper Power™ bear deterrent pepper spray from January, 2001, through and including February, 2003 constitute multiple violations of Sections 3(c)(1)(C) and 12(a)(1)(B) of FIFRA, 7 U.S.C. § 136a(c)(1)(C) and 7 U.S.C. § 136j(a)(1)(B), respectively, and regulations promulgated at 40 CFR Part 152.

10. Upon consideration of the nature, circumstances, extent and gravity of the violations, and Respondent's ability to continue in business, the size of Respondent's business, prior history of compliance, degree of culpability, lack of economic benefit resulting from the violations, its good faith and immediate effort to comply once informed of the violations, other matters as justice may require, and upon consideration of the entire record herein, EPA offers this CESA under its expedited enforcement procedures in order to settle the violations based upon the findings noted above, for the total civil penalty amount of **seventeen thousand two hundred and eight dollars (17,208.00)**.

C. CIVIL PENALTY

1. The Respondent signing below admits that EPA has jurisdiction over the subject matter alleged in the CESA, neither admits nor denies the specific factual allegations contained in the CESA, and consents to the assessment of the penalty as stated in section B.10, above.

2. Respondent agrees and consents that after Respondent has received the Final Order in this matter, Respondent shall pay a civil penalty of **seventeen thousand two hundred eight dollars (\$17,208.00)** in eight payments of two thousand one hundred fifty one dollars (\$2151.00) each in accordance with the following schedule:

1st payment of \$2151.00 is due and must be received by not later than 11/21/03;

2nd payment of \$2151.00 is due and must be received by not later than 02/21/04;

3rd payment of \$2151.00 is due and must be received by not later than 05/21/04;

4th payment of \$2151.00 is due and must be received by not later than 08/21/04;

5th payment of \$2151.00 is due and must be received by not later than 11/21/04;

6th payment of \$2151.00 is due and must be received by not later than 02/21/05;

7th payment of \$2151.00 is due and must be received by not later than 05/21/05;

8th payment of \$2151.00 is due and must be received by not later than 08/21/05;

by sending certified or cashier's checks, payable to "Treasurer, United States of America" to the following address:

Mellon Bank
EPA Region8
(Regional Hearing Clerk)
P.O. Box 360859M
Pittsburgh, PA 15251

a. The checks shall reference the name and address of Respondent's facility and the EPA docket number of this action.

b. **Copies of the cashier's or certified checks** shall be sent simultaneously to:

Tina Artemis
Regional Hearing Clerk
U.S. EPA, Region 8 (8RC)
999 18th Street, Suite 300
Denver, Co 80202-2466

(and)

Brenda L. Morris
Enforcement Attorney
U.S. EPA, Region 8 (8ENF-L)
999 18th Street, Suite 300
Denver, Co 80202-2466

3. Pursuant to 31 U.S.C. § 3717, EPA is entitled to assess interest and penalties on debts owed to the United States and a charge to cover the cost of processing and handling a delinquent claim. **Interest will therefore begin to accrue on a civil or stipulated penalty if the penalty is not paid when due.** Interest will be assessed at the United States Treasury tax and loan rate in accordance with 4 CFR § 102.13(c). A charge will be assessed to cover the costs of debt collection, including processing and handling costs and attorneys fees. In addition, a penalty charge of six (6) percent per year will be assessed on any portion of the debt that remains delinquent more than ninety (90) days after payment is due. Any such penalty charge on the debt will accrue from the date the penalty payment becomes due and is not paid. 4 CFR §§ 102.13(d) and (e).

D. TERMS AND CONDITIONS

1. Nothing in this CESA shall be construed as a waiver by EPA of its authority to seek costs or any appropriate penalty associated with any collection action instituted as a result of Respondent's failure to perform pursuant to the terms of this CESA.

2. The undersigned representative of Respondent certifies that he is fully authorized to enter into the terms and conditions for this CESA and to bind the party he represents to the terms and conditions of this CESA.

3. The parties agree to submit this CESA to the Regional Judicial Officer, with a request that it be incorporated into a Final Order.

4. Each party shall bear its own costs and attorneys fees in connection with this matter.

5. Respondent has the right to request a hearing on any material fact or on the appropriateness of the penalty contained in this CESA pursuant to 40 C.F.R. § 22.15. Upon signing and returning of this CESA to EPA, the Respondent waives the opportunity for a hearing pursuant to Section 554 of the Administrative Procedure Act, 5 U.S.C. §554.

6. This CESA, upon incorporation into a Final Order, applies to and is binding upon EPA and upon Respondent and Respondent's parent, affiliates, heirs, successors and assigns. Any change in ownership or corporate status of Respondent including, but not limited to, any transfer of assets or real or personal property shall not alter Respondent's responsibilities under this CESA. This CESA, upon incorporation into a Final Order by the Regional Judicial Officer and full satisfaction by the parties, shall be a complete and full civil settlement of the specific violation alleged in the CESA.

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8, Office of Enforcement, Compliance
and Environmental Justice, Complainant.**

Date: 9/22/03

By: **SIGNED**
Elisabeth Evans
Director
Technical Enforcement Program

Date: 9/22/03

By: **David J. Janik**
Michael T. Risner, Director
David Janik, Supervisor
Legal Enforcement Program

Date: 9/22/03

By: **SIGNED**
Brenda L. Morris, Attorney
Legal Enforcement Program

UDAP INDUSTRIES
Respondent.

Date: 9/17/03

By: SIGNED
(Signature of authorized representative)

Mark Matheny
(Printed or Typed Name of Signatory)

CERTIFICATE OF SERVICE

The undersigned certifies that the original of the attached **COMPLAINT AND EXPEDITED SETTLEMENT AGREEMENTS/FINAL ORDER** in the matter of **UDAP INDUSTRIES, DOCKET NO.: FIFRA-08-2003-0015** was filed with the Regional Hearing Clerk on September 22, 2003.

Further, the undersigned certifies that a true and correct copy of the document were delivered to Brenda Morris, Enforcement Attorney, U.S. EPA - Region 8, 999 18th Street - Suite 300, CO 80202-2466. True and correct copies of the aforementioned document was placed in the United States mail certified/return receipt on September 22, 2003 to:

Mark Matheny
UDAP Industries
13160 Yonder Road
Bozeman, MT 59718

September 22, 2003

SIGNED _____
Tina Artemis
Regional Hearing Clerk

THIS DOCUMENT WAS FILED IN THE REGIONAL HEARING CLERK'S OFFICE ON SEPTEMBER 22, 2003.